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No. 07-1209

In The Supreme Court of the United States

JAMES B. PEAKE, Secretary of Veterans Affairs,

Petitioner,

v.

WOODROW F. SANDERS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR THE AMERICAN LEGION, MILITARY ORDER OF THE PURPLE HEART, AND NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE AMERICAN LEGION, MILITARY ORDER OF THE PURPLE HEART, AND NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS[1]

The American Legion, Military Order of the Purple Heart, and National Veterans Legal Services Program respectfully submit this brief as *amici curiae* in support of respondents.

INTERESTS OF *AMICI CURIAE*

The American Legion was chartered by Congress in 1919 as a patriotic, mutual-help, war-time veterans' organization. It now is a community-service organization with nearly three million members. The American Legion serves military veterans in a myriad of ways. Among the many services it provides are assistance and representation of veterans in matters involving the Department of Veterans Affairs, including help with appeals for veterans' benefits, reporting on the impact on veterans of Department of Veterans Affairs health care policies,

[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

and assisting severely injured servicemembers with help in transitioning from the military.

The Military Order of the Purple Heart was formed in 1932 for the protection and mutual interest of all who have received the Purple Heart. The Purple Heart is a combat decoration awarded to members of the armed forces of the United States who are wounded by an instrument of war by the hands of the enemy. Composed exclusively of Purple Heart recipients, the Military Order of the Purple Heart is the only veterans' service organization comprised strictly of "combat" veterans. Nonetheless, the Military Order of the Purple Heart Service Program exists to assist all veterans in working with the Department of Veterans Affairs and in filing claims for available benefits. The Military Order of the Purple Heart Service Program has experts on veterans' benefits at various administration regional offices, hospitals, veterans' centers, and state and county veterans' facilities. The Military Order of the Purple Heart Service Program's benefits experts process veterans' claims for compensation, pension, medical care, education, job training, employment, veterans' preferences, and housing, death, and burial benefits.

The National Veterans Legal Services Program is an independent, non-profit, charitable organization that has worked for veterans' rights for more than 25 years. It provides advocacy and training services to help veterans and advocates for veterans navigating the benefits program of the Department of Veterans

Affairs by preparing educational materials and publications, including a comprehensive *Veterans Benefits Manual* and by engaging in and assisting in *pro bono* litigation related to veterans' rights. Since it was founded in 1980, the National Veterans Legal Services Program has directly represented more than 1000 claimants before VA regional offices, the Board of Veterans' Appeals, and the United States Court of Appeals for Veterans Claims. The National Veterans Legal Services Program also frequently submits testimony to Congress regarding the increasingly large number of disabled veterans who require representation for their claims before the Department of Veterans Affairs, and it has been instrumental in the passage of legislation designed to protect the rights of veterans.

As members of the armed forces continue to serve our Nation in wartime conflicts, the number of veterans seeking disability benefits continues to increase at a rapid pace. In fiscal year 2007, the number of initial claims for veterans' disability benefits totaled a staggering 838,000. *See* GAO, *Veterans' Disability Benefits: Claims Processing Challenges Persist, while VA Continues to Take Steps to Address Them*, GAO-08-473T, at 5 (February 2008), *available at* http://www.gao.gov/new.items/d08473t.pdf [hereinafter GAO 2008]. This constitutes a 45% increase from 2000, when 579,000 claims were filed. *Ibid.*

The steady increase in claims for veterans' benefits means that *amici*, which often provide claim assistance from initial filing through the appeals process, have been called upon more than ever to continue their mission to assist disabled servicemembers. *Amici* have repeatedly witnessed first hand how the claim adjudication process works before the Department of Veterans Affairs; the Court's resolution of the instant case will have a profound effect on how the Department discharges its statutory duty to provide notice and assistance to those veterans seeking the benefits Congress granted them.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. The administrative system for review of claims for veterans' benefits at the Department of Veterans Affairs (VA) is guided by the principle that a veteran of the Nation's armed services is entitled to all possible assistance to obtain benefits to which he or she is legally entitled. The process established by Congress shares none of the more adversarial characteristics that exist in government entitlement programs such as Social Security.

A critical and unique element of the VA's nonadversarial claims system is the duty of notice and assistance that Congress imposed on the VA in

the Veterans Claims Assistance Act (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000). Through this major renovation of the claims process, Congress requires that the VA provide notice to a veteran, at the outset of the benefits claim process, of "any information, and any medical or lay evidence" that is needed to substantiate the veteran's claim to benefits. 38 U.S.C. § 5103(a). The VA also must notify the veteran of "which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant." Section 5103A specifically imposes on the VA a "duty to assist" veterans with their claims for benefits. The VA must make reasonable efforts to assist a veteran to obtain the evidence necessary to substantiate his or her claim for benefits, including the VA obtaining both private records and government records for the veteran. 38 U.S.C. § 5103A(a), (b).

History has shown that the VA repeatedly violates its statutory duty of notice and assistance. *Amici* have witnessed first hand that the VA often neglects to provide notice of what evidence is necessary to substantiate claims by veterans, and also fails to assist veteran claimants, many of whom make substantial sacrifices for their country in their physical and mental well-being and are legally entitled to the benefits they are attempting to obtain. The Board of Veterans' Appeals repeatedly fails to

reverse decisions by regional VA offices that deny veterans their claims for benefits despite the VA's violation of its own duty of notice and assistance to the veteran.

B. At issue in the instant dispute is whether a veteran claimant must bear the burden of demonstrating on judicial review that he or she was prejudiced by the VA's violation of its duty under the VCAA to notify and assist the veteran to get the evidence to support his or her claim.

Contrary to the Secretary's contention, there is no basis for this Court to look outside of the veterans' benefits laws to the Administrative Procedure Act (APA) and to impose the burdens of the APA administrative framework in the context of the veterans' claims process. Had Congress intended to incorporate APA procedures into the veterans' claims process, Congress would have done so explicitly, as it did for several federal entitlement programs. The Federal Circuit correctly reasoned that, in light of the overall text, structure and purpose of the relevant provisions of the VA statutes, "the rule of prejudicial error" set forth in 38 U.S.C. § 7261(b)(2) to govern review by the Court of Appeals for Veterans Claims must presume prejudice to a veteran claimant for the VA's failure to fulfill its duty to notify and assist veterans.

Requiring a veteran to demonstrate on judicial review a lack of prejudice from the VA's statutory violation, as the Secretary urges, means that a

veteran must prove that he or she had material evidence to present that would have affected the outcome of the proceeding. But the Secretary's construction eviscerates the VA's duty of notice and assistance by requiring the veteran claimant to figure out on his or her own what evidence is necessary to prove the claim to benefits and must somehow obtain that evidence even though such evidence often is in records that the VA either possesses or is more readily equipped to obtain. That is exactly what Congress mandated that the VA do at the outset of the claim process. The rule of prejudicial error in Section 7261(b)(2) cannot bear that reading because, as the Federal Circuit concluded, "interpreting § 7261(b)(2) as requiring veterans to overcome a series of complex legal hurdles in order to secure the assistance mandated by Congress would clearly frustrate the purpose of the VCAA." Pet. App. 21a.

C. The decision below must be affirmed because a contrary ruling would permit the Department of Veterans Affairs to evade the statutory duty that Congress imposed on the Department to provide notice and assistance to veteran claimants.

Amici recognize that not every veteran's claim will be handled perfectly by the Department of Veterans Affairs. But the track record of the Department of Veterans Affairs is so far from perfect that, during a recent twelve-year period, the United States Court of Appeals for Veterans Claims set aside rulings by the Board of Veterans' Appeals and remanded the case or awarded benefits on appeal in a

staggering 77.7% of the cases that veterans pursued judicial review.

There is no merit to the Secretary's contention that the VA somehow later in the process can correct its failure to provide to a veteran the required notice and assistance. The Secretary points to no evidence that the VA does, in fact, correct its VCAA violations after an initial VA decision denying benefits to a veteran. Indeed, many judicial reversals of claim denials are because of the very issue in this case—*viz.*, that the VA failed to follow the explicit provisions of the VCAA duty to notify and assist veterans seeking benefits.

Moreover, most of the VA's errors, including violations of its duty to notify and assist veteran claimants, go unreviewed. Empirical evidence demonstrates that, absent the statutory notice and assistance from the VA, claims are not fully developed and are often erroneously denied. Veterans are left either to unwittingly abandon the benefits to which, in fact, they are lawfully entitled or to navigate a daunting, sometimes overwhelming, time-consuming appellate review process. More often than not the veteran claimant decides to forgo his or her potential benefits. Data demonstrate that there is no administrative appeal in 90% of all initial decisions by regional VA offices.

ARGUMENT

CONGRESS DID NOT IMPOSE ON VETERANS WHO SEEK REVERSAL OF THE DENIAL OF THEIR BENEFITS CLAIMS, A BURDEN TO SHOW THEY WERE PREJUDICED BY THE DEPARTMENT OF VETERANS AFFAIRS' VIOLATION OF ITS STATUTORY DUTY TO NOTIFY AND ASSIST THEM WITH THEIR CLAIMS

A. Congress Has Mandated That The VA Notify Veteran Claimants Of What Evidence Is Necessary To Substantiate Their Claims And Who Is To Provide It, And That The VA Assist In Obtaining That Evidence

1. Under the VCAA, once a veteran submits an application for "a benefit under the laws administered by the Secretary" of Veterans Affairs, including various claims for education, pension, medical, compensation, and burial benefits, several statutory duties for the VA are triggered.[2] 38 U.S.C. § 5102(b). First, if the application is incomplete, the VA regional office handling the claim does not deny it;

[2] Most claims, including those in this case, are for disability compensation connected to the veteran's service in the armed forces. James P. Terry, Board of Veterans' Appeals, *Report of the Chairman*, Fiscal Year 2007, at 19, *available at* http://www.va.gov/Vetapp/ChairRpt/BVA2007AR.pdf [hereinafter Chairman's Report].

instead, the VA is statutorily required to provide the claimant with notice of the "information necessary to complete the application." *Ibid.*

Second, once the application is "complete or substantially complete," the VA must notify the claimant "of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." *Id.* § 5103(a). The VA must further notify the veteran as to "which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5013A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant." *Ibid.*

Third, under Section 5103A, the VA must make reasonable efforts to assist the claimant in obtaining substantiating evidence, including private and government records. The Secretary's statutory duty to assist in obtaining the necessary substantiating evidence is obviated only "if no reasonable possibility exists that such assistance would aid in substantiating the claim." *Id.* § 5103A(a)(2). And, for disability compensation claims in particular, Congress stated that the assistance under Section 5103A "shall include" the VA obtaining records specifically listed in the statute, such as service medical records and VA facility records, *id.* § 5103A(c), as well as "a medical examination or obtaining a medical opinion" when necessary to make a decision on the claim, *id.* § 5103A(d)(1). Thus, the

VA is mandated by law to share in the burden of production when a veteran files a claim for benefits. *See Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (explaining that the burden of production means the "party bears the obligation to come forward with the evidence at different points in the proceeding," and is distinct from the burden of persuasion) (citing *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)).

This duty of notification and assistance that Congress imposed on the VA in the benefits claims process, including the sharing of the burden of production, is structured to help ensure that claims by veterans are fully developed at the initial time of filing before the VA regional office. *See* S. Rep. No. 106-397, at 22 (2000); *Pelegrini v. Principi*, 18 Vet. App. 112, 119-120 (2004) (noting that these statutory requirements "mandate that notice precede an initial" decision). The VA's obligation to provide notice to the claimant of required evidence and who is to provide the evidence also helps ensure that the veteran understands *before* the initial adjudication of his or her claim by the regional office, what evidence the VA will obtain and what the veteran is supposed to provide.[3]

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[3] If a veteran is dissatisfied with the initial decision by the regional office, the veteran must submit a Notice of Disagreement (NOD). 38 U.S.C. § 7105(a)-(b). Upon receipt of an NOD, the VA office handling the claim must prepare a Statement of the Case, which summarizes the basis for its initial

(Continued on following page)

The VA's duty to notify and assist veteran claimants is especially important because veterans are prohibited from retaining counsel to represent them for their initial administrative claim filing. 38 U.S.C. § 5904(c)(1) (allowing only *pro bono* representation and not paid counsel for filing of initial claim for benefits by veteran). Veterans can retain counsel to represent them only upon an administrative appeal. *Ibid*. And that permission for a veteran to hire and fully pay an attorney or non-attorney representative to handle an administrative appeal in most circumstances, was not allowed until 2007. *See* Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403, 3405-3409 (2006). Even with the right to private counsel on administrative appeal, most veterans are not represented by retained attorneys. *See* Chairman's Report at 20 (noting that only 2% of appeals to the Board of Veterans' Appeals in fiscal year 2007 were handled by private attorneys). Veterans usually rely on veterans' service organizations, such as *amici*, to provide assistance. Such organizations represented over 80% of the

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decision. *Id*. § 7105(d). When such an adverse initial decision is appealed to the Board of Veterans' Appeals, the Board reviews the claim *de novo*. *See* 38 U.S.C. §§ 301(c)(5), 7101 *et seq*. The United States Court of Appeals for Veterans Claims has jurisdiction over appeals of Board decisions, *see* 38 U.S.C. § 7252(a), and then the Federal Circuit has jurisdiction over those rulings by the Veterans Claims court. *See* 38 U.S.C. § 7292(c).

claimants during fiscal year 2007. *Ibid.* That staggering number of appeals has the potential to overextend *amici*'s resources as claims continue to increase.

This VA benefits claims process is unlike the adversarial process in general government entitlement programs. For example, regulations promulgated pursuant to the federal Food Stamp Program, recently renamed the Supplemental Nutrition Assistance Program, *see* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008), provide that, although a state agency will "assist" a household with an application, it is the filer that "has primary responsibility for providing documentary evidence" supporting an application. 7 C.F.R. § 273.2(f)(5)(i). As for the Social Security Act, the only mention of notice that is remotely comparable to the VA notice requirements deals with providing clear concise notice of a denial of benefits. *See* 42 U.S.C. § 405(b)(3)(B). The Social Security Act does not contemplate, let alone specifically mandate, a collaborative effort between the agency and the claimant as the VA claims process does. Although the Social Security Administration will develop a claimant's relevant medical history prior to an initial determination, regulations do not provide for a more intensive role for the agency to ensure that all available evidence is reviewed, as the VA process is structured to do.

2. Congress thus created in the VCAA an administrative scheme that relieves a veteran claimant of much of the initial burden to produce the evidence to substantiate his or her claim. And it is the duty of the VA to make sure, before the VA is relieved of its duty to assist a veteran, that there is no basis for the claim. *See Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (explaining that the VA must "give a sympathetic reading" to veterans' filings and consider all potential claims regardless of whether raised by the veteran).

This comes as no accident. Since the VA was established as an independent agency in 1930, Congress has explicitly refused to adopt for veteran claims "the adversary mode of dispute resolution utilized by courts in this country," and instead has maintained an administrative benefits claim system "with a high degree of informality and solicitude for the claimant." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309-311 (1985). Indeed, when Congress created the first judicial review provision for veteran claimants under the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), Congress emphasized that the system was "a beneficial non-adversarial system of veterans benefits" in which the VA "fully and sympathetically develop[s] the veteran's claim to its optimum before deciding it on the merits." H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795; *see also Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) ("even in creating judicial review in the

veterans context, Congress intended to preserve the historic, pro-claimant system").

Congress further made clear the broad reading that the VA must give to veteran claims when Congress provided that the Secretary must give the veteran the benefit of the doubt on disputed material issues that are in equipoise. Congress directed that, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b).

Moreover, Congress's imposition of the duty on the VA of notice and assistance in its November 2000 enactment of the VCAA was partially in response to the decision by the United States Court of Appeals for Veterans Claims in *Morton v. West*, 12 Vet. App. 477 (1999). *Morton* required a veteran to first prove that his or her claim was "well grounded" before the VA would assist in the development of the claim for an initial adjudication. *Id.* at 485. The *Morton* ruling imposed upon the veteran claimant the initial burden to demonstrate, in effect, a *prima facie* case for benefits.

Congress responded to *Morton* by rejecting in the VCAA the imposition of any such burden on veterans to make a *prima facie* case. As noted above, under the VCAA, if a veteran files an incomplete claim, the VA cannot deny it on those grounds, but rather must notify the veteran of the information necessary

to complete it. 38 U.S.C. § 5102(b). And the VA's duty to notify or assist in obtaining evidence does not contain any *prima facie Morton* requirement. The VA must assist in obtaining evidence unless "no reasonable possibility exists" that the VA assistance would help to substantiate the claim. *Id*. § 5103A(a)(2).

3. The Secretary is wrong that the VCAA "was not intended to change the VA's practice." Pet. Br. 20. The House and Senate Reports accompanying the legislation specified that the provisions in the VCAA regarding the VA's duty of notice and assistance would "substantially revise" pre-existing laws, H.R. Rep. No. 106-781, at 9 (2000), and "clarified and expanded [the] VA's duty to assist claimants," S. Rep. No. 110-449, at 7 (2008).

The Secretary's attempt to minimize the significance of the VCAA is belied by the Secretary's testimony before Congress earlier this year. As part of the budgetary process, the Secretary has not hesitated to invoke the VCAA's requirements of VA notice and assistance as a basis for the VA's need for federal funding. The Secretary testified before the Senate Committee on Veterans' Affairs as follows:

> The Veterans Claims Assistance Act of 2000 has significantly increased both the length and complexity of claims development. VA's notification and development duties have grown, adding more steps to the claims process and lengthening the time it takes to develop and decide a claim. Also, the

> Department is now required to review the claims at more points in the adjudication process.

Hearing on FY 2009 Budget for Veterans Programs: S. Comm. of Veterans' Affairs, 110th Cong. (Feb. 13, 2008), *available at* http://veterans.senate.gov/public/index.cfm?pageid=16&release_id=11506&sub_release_id=11537&view=all (Statement of James B. Peake, Secretary of Veterans Affairs).[4]

B. The Judicial Review Provision In Section 7261(b)(2) Does Not Impose APA Standards And Does Not Require A Veteran Claimant To Prove Prejudice From The VA's Violation Of Its Statutory Duty To Notify And Assist The Veteran

1. The Secretary's position in this case would undermine the core purpose of Congress in enacting the unusual nonadversarial, pro-claimant statutory scheme for veteran benefits claims. The Secretary would construe the "prejudicial error" provision in

[4] Even if the effects of the VCAA were "restorative," as the Secretary contends, *see* Pet. Br. 21, it would not diminish the statutory duty imposed on the VA because under the earlier statutory scheme, the VA bore a significant portion of the burden of production and the veterans' benefits system, including the VJRA and its judicial review provisions, were interpreted in a pro-claimant manner. *See Hodge v. West*, 155 F.3d 1356, 1362-1363 (Fed. Cir. 1998) (noting, prior to the VCAA's enactment, that the veterans' benefits system and its accompanying judicial review provisions, are pro-claimant).

38 U.S.C. § 7261(b)(2) to require the same construction as the prejudicial error standard found in the Administrative Procedure Act (APA), 5 U.S.C. § 706(b). Pet. Br. 11-14. But the Secretary's interpretation of Section 7261(b)(2) ignores the structure and purpose of the veterans claims process created by Congress, which is different from the structure and purpose of the APA.

The fact that Section 7261(b)(2) uses the language of "prejudicial error" which is also used in the APA does not require that the language be given the same meaning in the two statutory provisions. Even within the same statute, the presumption of identical interpretation of the same term "is not rigid and readily yields" when words are used "with [a] different intent." *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595-597 & 595 n.8 (2004) (citation omitted).[5] Certainly, when Congress uses a term in two different statutes enacted at different times with different purposes such as here, there is

[5] According the statutory context its proper weight in its own statutory context disposes of the government's reliance on *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006), which indicates that a settled judicial interpretation of a statutory provision will, "as a general matter," apply to that language in a new statute, *id.* at 85-86, because a different intent or purpose in a subsequent specific statutory scheme trumps such a general proposition. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general").

no requirement that the term be used to mean the exact same thing. *Id*. at 595 n.8.

Furthermore, the Secretary's interpretation of the VCAA and Section 7261(b)(2) cannot be reconciled with "the cardinal rule that a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal citations omitted); *see also United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' ") (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849)).

Section 7261(b)(2) is included in the statutory provision that governs the scope of review of decisions of the Board of Veterans' Appeals by the United States Court of Appeals for Veterans Claims. It states that when the court reviews the record that was before the VA and the Board of Veterans' Appeals, the court must "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2). That text must be interpreted in light of the rest of the overall statutory scheme for determination of veterans' benefits claims, with which it interacts, in particular the numerous obligations that the VCAA imposes *on the VA* rather than on the veteran claimant. It does not follow that APA standards of review apply.

Congress elsewhere has made clear when it intends for APA review to govern particular benefit programs. When Congress enacted the Medicare Act, established under Title XVIII of the Social Security Act, Pub. L. No. 89-97, 79 Stat. 291 (1965), codified as amended at 42 U.S.C. § 1395 *et seq*., it explicitly provided for APA review of a decision denying provider reimbursement for a Medicare claim by stating that judicial review would be had in federal district court and the matter "tried pursuant to the applicable provisions under chapter 7 of title 5," with chapter 7 being the judicial review provisions of the APA. *See* 42 U.S.C. § 1395oo(f)(1). Similarly, when an institution's application to participate in the Food Stamp Program is denied, the statute explicitly provides for "opportunity for an agency hearing in accordance with section 556 and 557 of title 5," which is where the APA administrative hearing process is set out. 7 U.S.C. § 2023(a)(6).

2. The Secretary's interpretation of the VCAA and Section 7261(b)(2) makes no sense. Under that interpretation, a veteran denied benefits by the VA must demonstrate that he was prejudiced by the VA's violation of its duty of notice and assistance and, to do so, the veteran must prove that he or she had material evidence to present that would have affected the outcome of the benefits claims proceeding. Pet. Br. 29, 37. But such a rule eviscerates the VA's duty of notice and assistance because the veteran is being given a burden that Congress rejected—the veteran must attempt to figure out what evidence is

necessary to prove his claim and must somehow obtain that evidence even though it is often in records that the VA either possesses or is more readily equipped to obtain. That is exactly what Congress mandated that the VA do at the outset of the claim process. The Secretary cannot turn the VCAA on its head and impose that mandate on the veteran at the judicial review stage when the VA has failed to fulfill that duty at the initial claim stage.

3. This Court's jurisprudence on burden of production and persuasion further undermines the Secretary's interpretation. Although the burden of proof (both production and persuasion) is often imposed upon the party seeking relief, *see Schaffer*, 546 U.S. at 57, Congress has mandated in the VCAA that those ordinary principles do not apply. Congress in the VCAA imposed the burden on the party that "occupie[s] the position of advantage," *Tinker v. Midland Valley Mercantile Co.*, 231 U.S. 681, 682-683 (1914) (Holmes, J.), which unquestionably is the VA. Congress explicitly recognized in the VCAA that the VA is in the better position to substantiate a veteran's claim with the necessary evidence. *See* 38 U.S.C. §§ 5103-5103A.

C. Congress Did Not Intend Veteran Claimants To Bear A Burden To Prove Prejudice Because Congress Is Well Aware That Veteran Claimants Already Bear The Burden Of Navigating A Difficult And Dysfunctional Claims Process Administered By The Department Of Veterans Affairs

1. The VA's violation of its duty to notify and assist veterans often thwarts Congress's goal of early claim resolution and provision of benefits to all veterans legally entitled

The VA has consistently failed to provide the requisite notice and assistance to veterans that it is mandated to provide under the VCAA. That has had a disastrous effect on veteran claimants and undermined Congress's intent that the claims process for veterans be prompt and straightforward. In 2002, the GAO reported that VA notices to veterans about their claims for benefits "explained some, but not all, of the key aspects that the claimants needed to understand." GAO, *Veterans Benefits Administration: Clarity of Letters to Claimants Needs to Be Improved*, GAO-02-395, at 7 (April 2002), *available at* http://www.gao.gov/new.items/d02395.pdf [hereinafter GAO 2002]. The GAO found that "[a]bout 43 percent" of the letters aimed at developing a claim for a veteran claimant "did not clearly explain the actions the claimant should take." *Id*. at 21. *Amici* have witnessed first hand numerous instances where

veterans were not even notified about readily-available information that could win their cases.

The Senate recently enacted the Veterans' Benefits Improvement Act of 2008 to attempt to improve the notifications that the VA provides to veterans. *See* S. 3023, 110th Cong. § 101 (2008) (requiring the VA to promulgate regulations that would clarify notification letters, though not adequately addressing shortcomings in the VA's duty to assist). The Senate Report accompanying the legislation explicitly concluded that notices "are not meeting the goal of providing claimants with sufficient, clear information on which they can then act." S. Rep. No. 110-449, at 7 (2008). The report notes that a congressional staff member recently conducted oversight visits to 19 different VA regional offices and found that VCAA letters "provide little practical assistance" to veterans. S. Rep. No. 110-449, at 7 (2008). "In many of the claims examined, information that would have been helpful in substantiating the claim was missing. However, the files did not indicate that VA had requested the missing information." *Id.* at 7-8. Moreover, recent news reports have documented VA shortcomings in its claims' handling process. *See* Rick Maze, *VA claims found in piles to be shredded*, ARMY TIMES (Oct. 17, 2008), *available at* http://www.armytimes.com/news/2008/10/military_va_stopshredding_101608w/.

The VA cannot claim insufficient time to meet its duty to notify and assist veterans filing claims. In the

instant case, for example, the VA had respondent Sanders's initial claim for nearly 3 years before denying it. Pet. App. 25a-27a.

One of the reasons that the VA so often fails to provide adequate notice and assistance is because it is plagued by an inefficient field structure, which is comprised of 57 regional offices that "experience large performance variations and questions about decision consistency." GAO, *Veterans' Disability Benefits: Long-Standing Claims Processing Challenges Persist*, GAO-07-512T, at 10-11 (March 2007), *available at* http://www.gao.gov/new.items.d07512t.pdf.

Inadequate training at the VA regional offices also accounts for substandard treatment of veterans' claims. Fifty percent of claim processors think they are ill-equipped to perform their jobs and over 80% of them criticize the system for placing too much weight on speed rather than accuracy. *See Board of Veterans' Appeals Adjudication Process and the Appeals Management Center: Hearing Before the H.R. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans' Affairs*, 110th Cong., at 2 (2007) [hereinafter Subcomm. Hearing] (statement of Chairman Hall); *see also id.* at 5 (statement of Barton F. Stichman, Joint Executive Director, National Veterans Legal Services Program [hereinafter Stichman statement]) ("part of the reason for the problems is the pressure put on [the VA system] * * * to decide cases quickly").

2. The Secretary is wrong that the multi-step claim process somehow obviates the prejudice from the VA's violation of its duty to notify and assist veterans

a. The Secretary's response to the VA's violation of its statutory duty to notify and assist veterans with the filing of their claims for benefits is to point to later places in the administrative claims process where the lack of notice or assistance might be corrected. *See* Pet. Br. at 31-34. The Secretary relies heavily on the notion that the "multi-step process provides multiple opportunities for a claimant to obtain necessary evidence and learn of any deficiencies in his or her case." *Id.* at 31-32. The Secretary then takes the illogical jump to conclude that an insufficient initial notice is not prejudicial.

Neither of the respondents in the cases before this Court received sufficient assistance from the VA before the VA issued its initial denial of the claim. Both respondents were forced to endure a lengthy appellate process before receiving the assistance from the VA in obtaining evidence for their claims. For example, although the VA provided respondent Sanders "with two ophthalmological examinations" to develop evidence, *id.* at 32, Sanders did not receive these examinations until 9 years after he filed his

initial claim. Pet. App. 25a-29a. Similarly, the audiological examinations afforded to respondent Simmons to help develop evidence for her claim were scheduled after a wait of 4 years. Pet. App. 69a-70a.[6]

Moreover, even if a *post hoc* process were sufficient to excuse an initial failure to notify or assist a veteran, it is far from clear that the VA fulfills its statutory duty at any later point. For example, the United States Court of Appeals for Veterans Claims has remanded cases because of the failure of the VA, through the Board of Veterans' Appeals, *inter alia*, to provide a hearing,[7] to provide an adequate statement of reasons for denying a claim,[8] and

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[6] Even after waiting 4 years to receive these examinations, the court of appeals found "clear evidence" that Simmons was not given notice of the scheduled examination because of the VA's failure to properly address its letter. Pet. App. 74a-76a.

[7] *See*, *e.g.*, *Smith v. Peake*, No. 07-0150, 2008 WL 4415941, at *2 (Vet. App. Sept. 15, 2008) (holding that the Board failed to fulfill its duties by not providing a hearing to an imprisoned veteran); *Jones v. Nicholson*, No. 05-1926, 2007 WL 1302092, at *2 (Vet. App. Apr. 20, 2007) (explaining that the Board did not comply with regulatory hearing requirements because it failed to properly notify the claimant of a hearing).

[8] *See*, *e.g.*, *Vazquez-Flores v. Peake*, 22 Vet. App. 37, 48-50 (2008) (remanding to the Board due to a failure to provide adequate notice or an adequate statement of the case explaining the reasons for denial); *Hupp v. Nicholson*, 21 Vet. App. 342, 356 (2007) (noting that the Board failed to provide to the veteran an adequate statement of reasons or bases for its denial); *Daye v. Nicholson*, 20 Vet. App. 512, 517 (2006) (explaining that "in addition to failing to fulfill its heightened duty to assist, the Board also erred in failing to fulfill its concomitant duty to provide a thorough statement of reasons or bases").

to properly consider new evidence for a reopened claim.[9]

b. The Secretary's reliance on the multi-step process also inaccurately assumes that every denied claim is appealed. The VA's violation of its duty to notify and assist veterans leads to a contrary phenomenon. Unclear notifications from the VA to veterans about their benefit claims "confuse and frustrate" the veterans, which discourages them from "pursu[ing] benefits to which they are entitled." GAO 2002, at 8; *id*. at 28.

Indeed, "[a] lot of veterans with erroneous decisions don't bother to appeal. They give up. They have been pursuing their claim for years." Subcomm. Hearing at 5 (Stichman statement).

In fiscal year 2007, only 40,401 cases were decided by the Board of Veteran Appeals, *see* Chairman's Report at 20, even though there were 838,000 initial claims filed during that period, *see* GAO 2008, at 5. Moreover, only 4,644 cases were appealed to the Court of Appeals for Veterans Claims during 2007. *See* United States Court of Appeals for Veterans Claims, *Annual Reports*, *available at* http://www.vetapp.gov/documents/Annual_Reports_2007.pdf [hereinafter 2007 Annual Report].

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[9] *See*, *e.g.*, *Young v. Peake*, No. 06-1699, 2008 WL 2883713, at *1 (Vet. App. July 24, 2008) (remanding a case because the Board did not properly handle new evidence submitted to reopen a previously denied claim).

c. Even for those veterans who have the tenacity to appeal a claim denial, the VA appellate process is fraught with difficulties. *See* Subcomm. Hearing at 1 (statement of Chairman Hall) ("appealing an [initial] decision presents many challenges to our veterans").

In fiscal year 2007, the Board of Veterans' Appeals had a backlog of more than 40,000 cases and it took an average of more than 800 days from the time of filing for a claimant to receive a decision on an administrative appeal to the Board. *See* Chairman's Report at 14, 16. This delay is in addition to the more than 200 days that a claim spends at the VA regional office after being denied. *Id*. at 16. The Board orders a remand in 35% of the appeals which means further delay. *Id*. at 19. In sum, a veteran must wait an average of more than 3 years before potentially receiving benefits to which he or she was entitled at the time the claim was denied, and, of course, many claims are still incorrectly denied by the Board and are not reversed until the veteran seeks judicial review. *See* Subcomm. Hearing at 5 (Stichman statement) (explaining that over the 12 years leading up to fiscal year 2007 the Board's decisions were set aside 77% of the time).

If a veteran appeals the Board's decision to the Court of Appeals for Veterans Claims, there is an average of an additional 416 days for a final decision. 2007 Annual Report. This totals between 4 to 5 years before a veteran has a chance of receiving the benefits to which he or she is entitled.

The VA has sought to remedy this backlog by eliminating "avoidable remands" by the Board. Chairman's Report at 3. One such way the Board determines if a remand is necessary is by conducting a prejudicial error analysis of any alleged violation by the VA of its duty to notify and assist the veteran claimant. *Id.* at 4. If the Board determines that no prejudice resulted, it issues a final decision notwithstanding the notice error. *Ibid*. This approach by the VA suggests that the VCAA notice provisions are viewed "by the VA as a procedural hardship" rather than as the crucial element of the claims process that they are. *Id.* at 19 (statement of Richard Cohen, President, National Organization of Veterans Advocates, Inc.) (explaining that the duty to notify is "the essence of the case").

The review by the VA only for prejudice directly contravenes the VCAA mandate that veterans are entitled to have the VA provide them notice of what evidence they need to substantiate their claim and assistance from the VA in obtaining that evidence. In addition, rather than solving the backlog problem, this campaign "contribute[s] to the Board's poor performance by encouraging the Board to make a final decision on a case that should be remanded." Subcomm. Hearing at 6 (Stichman statement).

Moreover, of the merits decisions appealed to the Board of Veterans' Appeals in fiscal year 2007, the Board denied benefits in 66% of the cases it decided on the merits. Chairman's Report at 19. If most of these decisions were correct, then such a high denial

rate would not cause immediate alarm. However, during that same period, the Court of Appeals for Veterans Claims affirmed in only 34% of the cases appealed from the Board that it decided on the merits. 2007 Annual Report. Remarkably, this represented an improvement over the previous twelve years, where the Board of Veterans' Appeals was reversed over 77% of the time. *See* Subcomm. Hearing at 5 (Stichman statement).

By no measure does this system reflect Congress's intent to create an efficient and pro-claimant benefits claim process for those men and women who have risked their lives for our country. Congress, which is well aware of the dysfunctional nature of the VA appeals process, simply would not have imposed on top of all this a prejudicial error rule that gives the benefit of the doubt to the VA *after* it has been found to have violated its statutory duty to notify and assist the veteran claimant.

3. Unnecessary remands will not result from a correct statutory interpretation because the VA is capable of demonstrating that its violation of its statutory duty to notify and assist veterans did not prejudice a particular veteran

Even under the ruling below, it goes without saying that a veteran claimant bears the burden to demonstrate that the VA's notice or assistance was deficient in order for the claimant to be entitled to

any relief for a violation of the VCAA. *See Mayfield v. Nicholson*, 19 Vet. App. 103, 111 (2005) ("the appellant bears the burden of demonstrating specifically in what respects the particular notice documents are noncompliant in terms of the purposes sought to be achieved by the notice requirements"); U.S. Vet. App. R. 28(a).

But, once a veteran claimant establishes that the VA did not meet its statutory duty to provide him or her notice, at the outset of the benefits claim process, of "any information, and any medical or lay evidence" that is needed to substantiate the veteran's claim to benefits, 38 U.S.C. § 5103(a), or did not meet its duty to notify the veteran of "which portion of that information and evidence" is to be provided by the claimant and which by the Secretary, *ibid.*, or did not meet its duty to obtain for the veteran certain private or government records, 38 U.S.C. § 5103A(a), (b), prejudice to the veteran in pursuing his or her claim for benefits must be presumed. The Federal Circuit correctly reasoned that, in light of the overall text, structure, and purpose of the relevant provisions of the VA statutes, such prejudice is presumed, and "the rule of prejudicial error" set forth in 38 U.S.C. § 7261(b)(2) to govern review by the Court of Appeals for Veterans Claims must be so construed.

The Secretary is wrong that it would be "difficult," *see* Pet. Br. at 31, for the VA to overcome the presumption of prejudice if the error was truly not prejudicial to the veteran. As the court below found, the presumption could be overcome by the VA

demonstrating "(1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law." Pet. App. 12a.

It is not accurate to state, as the Secretary does, that the VA will likely have no information about a claimant's actual knowledge. *See* Pet. Br. at 35. For example, in *Short Bear v. Nicholson*, 19 Vet. App. 341 (2005), the veteran appealed her denial of benefits claiming that the VA's notice failed to inform her of the requirements for her claim. Despite the erroneous VA notice, the court held that the error was not prejudicial because the claimant had actual knowledge of the claim requirements through "information * * * provided on the claim form" itself. *Short Bear*, 19 Vet. App. at 344. Indeed, the Secretary acknowledges that claimants "may already be aware, through means other than a VCAA notice, of the types of evidence needed to substantiate his or her claim." Pet. Br. at 30.

There is no reason to believe that it will be difficult for the VA to demonstrate that a particular veteran had actual knowledge of the evidence necessary to substantiate his or her claim. The Secretary stresses that there is "a dialogue between the claimant and the VA that continues throughout the development" of the claim. *Id.* at 31. This dialogue should ensure that the veteran is fully apprised of the requirements for his or her claim and

that there is no VA violation of its VCAA duty of notice and assistance. But if an appeal does occur and such a violation is shown, actual knowledge on the part of the veteran, if there is such knowledge, could likely be gleaned from the records of these interactions.

Finally, the VA can overcome the presumption that its violation of its duty to notify and assist a particular veteran prejudiced that veteran by demonstrating either that it was unreasonable for the veteran not to understand what was needed, or that no prejudice occurred because the claimed benefit could not have been awarded as a matter of law. The VA can rebut the presumption of prejudice to a veteran by demonstrating that the veteran's claim had no reasonable possibility of being substantiated because Congress provided that the VA need not provide assistance to a veteran if there is no reasonable probability that a veteran can succeed on his or her claim. 38 U.S.C. § 5103A(a)(2); *see also*, *e.g.*, S. Rep. No. 110-449, at 10 (detailing claims for which there existed no duty to assist since there was no reasonable possibility of substantiation), Notice & Assistance Requirements & Technical Correction, 73 Fed. Reg. 23353, 23354 (Apr. 30, 2008) (to be codified at 38 C.F.R. pt. 3) ("the section 5103(a) notice duty does not arise when the claimant is not entitled to the claimed benefit as a matter of law").

This correct interpretation of the statute that places the burden on the VA to establish that its violation of its duty to notify and assist veterans did

not prejudice a particular veteran seeking benefits will not "lead to unnecessary remands that would delay the resolution of meritorious claims." *See* Pet. Br. at 31. This argument overlooks the critical fact that it is the VA's violation of its statutory duty to notify and assist veterans that is a significant cause of remands by the Board of Veterans' Appeals.

That is because the VA's duty to notify and assist is not a mere procedural formality. This duty goes to the very accuracy of the claim determination. When the VA fulfills its duty to the veteran of notice and assistance, the claim is processed based on more complete and more accurate information. And less remands would result. The chairman of the Board of Veterans' Appeals has noted that the VA's violation of its duty to notify and assist claimants is one of the most common reasons for remands. Chairman's Report at 3. *Amicus* has testified similarly, explaining that inadequate initial notices from the VA mean that all of the information necessary for a fair determination of a claim is not obtained and that leads to unnecessary appeals and remands. Subcomm. Hearing at 20 (Stichman statement).

On the other hand, the VA's fulfillment of its duty to veterans to notify them of what evidence is necessary to substantiate their claims, to notify them of which part of that evidence the veteran must provide and which part the VA will obtain, and to assist the veteran in obtaining private and government records to substantiate the claim would obviously lead to fewer remands because both the

grant and denial of benefits would be based on more fully developed records.

CONCLUSION

For the reasons set forth above and in respondents' briefs, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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